

July 15, 2009

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW.
Washington, DC 20580

Via weblink: <https://secure.commentworks.com/ftc-mortgageassistancereliefservices>

Re: Mortgage Assistance Relief Services Rulemaking, Rule No. R911003: Comments from California community groups

Dear members of the Federal Trade Commission:

We write on behalf of our members, nonprofit and community development organizations in California working to protect homeowners and their neighborhoods from the devastating impacts of foreclosure, to strongly urge the FTC to develop effective rules to address the new cottage industry of fee for service loan modification providers. With alarming and increasing frequency, we have seen these companies defraud vulnerable homeowners out of scarce savings while doing little or nothing to prevent foreclosure.

Introduction and Overview of the Problem:

It is clear that predatory mortgage lending and the resulting financial abuse of California borrowers over the last few years helped fuel our current economic crisis. Many of the same brokers, attorneys, real estate agents and other industry participants who initiated this abuse are now seeking to profit from the stress currently felt by millions of California homeowners at risk of foreclosure.

Homeowners who are facing foreclosure are vulnerable to deceptive solicitations from for-profit companies that promise solutions to their financial distress. In California, advertisements promising loan modification success are inescapable. Loan modification company advertisements in the mass media suggest guaranteed results and promise peace of mind. Mail solicitations are often targeted specifically at named homeowners who are facing foreclosure. For-profit companies identify vulnerable homeowners by scrolling through public records for recorded notices of homeowner default. Despite the promises of their advertisements and solicitations, our experience has been that for-profit loan modification companies do little or nothing to prevent foreclosure. These companies fail to mention to prospective clients that they have no control over the servicers' response to their efforts to forestall foreclosure (assuming any effort at all is even made). Yet

borrowers rely on these companies to negotiate with their loan servicers, and are often advised by them to refrain from contacting their servicer, only to find the company has done nothing except dig them a deeper hole.

Perhaps most importantly, the same services that are advertised and sold to homeowners, negotiating loan workouts, are available for FREE from hundreds of more qualified nonprofit housing counseling agencies who have the expertise and training and the mission to serve the interests of California homeowners. Many of the homeowners who have been taken advantage of by for-profit scammers find their way to nonprofit housing counselors, but at that point, the damage is done; the homeowner is closer to foreclosure and the client—who is by definition already in a severe financial crisis—is out thousands of dollars for the fee. The average fee that we are seeing borrowers charged is \$3,000; we have seen fees as high as a \$9,500. In nearly every instance, these fees are charged up front, before any services have been rendered.

Notably, many of the homeowners being charged these high fees have no realistic chance of being able to keep their home through loan modification. A brief consultation with an experienced housing counselor or legal services attorney—who are looking out for the homeowner’s interest rather than lining their own pockets—would have provided the homeowner information. Instead, loan mod scammers are extracting thousands of dollars that homeowners with no hope at all of keeping the home need to move on with their lives.

An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services, sometimes engaging in fee-splitting or even simply acting as fronts for loan modification companies who are seeking to avoid state laws that prohibit some of the practices described above but exempt attorneys. California Civil Code Section 2945.

Another highly troubling aspect of this problem is that the State of California is currently enabling these practices by authorizing DRE licensees to charge advance fees for loan modifications. While the state officially disclaims any endorsement of these agreements, it is effectively condoning this profoundly flawed process by permitting some of its licensees to charge advanced fees as loan modification “specialists”.

Housing Counselors Report Evidence of Fraud and Shoddy Work

A recent survey of housing counseling agencies and legal service offices, collectively serving over 11,000 consumers in the month of March 2009, confirms the growing problem of fee for service loan modification consultants.¹ Over two-thirds of counselors reporting noted an increase in the number of borrowers who had previously paid for loan modification services, with 31.5% of respondents noting a large increase. In the words of one agency, “Almost everyone who calls us has either paid someone for modification assistance or is considering doing so.”

¹ California Reinvestment Coalition, “The Ongoing Chasm Between Words and Deeds V: Abusive Practices Continue to Harm Families and Communities in California,” June 2009, at www.calreinvest.org

Counselors report these for-profit providers did little work and delivered poor outcomes. More than half of counselors reviewing borrowers' files reported "No Service" or "Little Service Was Provided by the Consultants" (56%, 57%), and that "Borrower Received a Bad Outcome" (61%). Disturbingly, nearly half of counselors (46%) report that borrowers were told by fee-based consultants that they should NOT contact their loan servicer, leaving homeowners in the dark about the status of their loan and potentially propelling borrowers further towards foreclosure.

For-profit providers are charging advanced fees, as well as other fees. Nearly three-fourths of counselors (74%) responding noted that the borrowers were charged advance fees by loan mod consultants. But counselors also report that borrowers paid fees other than advance fees. Reports of monthly service fees charged by for-profit consultants are not uncommon. As one counselor noted, "Advance fees are paid in addition to a monthly fee of \$800.

The potential for abuse of desperate consumers is great. Counselors report that advertisements often reference the President's Home Affordable Plan (29% of counselors responding), and that consumers, and the for-profit companies charged borrowers who were never good candidates for loan modification to begin with (with 21% of respondents so reporting), meaning there was little to no chance they would be able to help the borrower despite charging a fee. Nearly half of counselors responding (48%) agree that those victimized are often non-English speakers presumably targeted for scams because of their relative lack of access to accurate information and non-profit resources.

The cast of characters taking advantage of consumers is great, and efforts to protect homeowners must cover all parties. A majority of counselors responding observed that law offices, attorneys partnering with non-attorneys, licensed brokers and real estate agents were implicated in fee-based loan modification scams. Also involved are unlicensed brokers as well as companies with advanced fee agreements that were approved by the Department of Real Estate.

To respond to this crisis, housing counselors have reported abuses to attorneys, law enforcement (61% of respondents), and legal aid offices (52%), and have also attempted to recoup money for the borrower themselves (44%), contacted the company's regulator (28%), and gone to the media (20%).

The Hard Work of Foreclosure Prevention:

The process of assisting a client facing foreclosure can be time-consuming and complicated. The following is an example of how one non-profit attorney works to help clients avoid foreclosure.²

"The initial assessment ...includes consideration of the current programs, policies and procedures of the servicing company handling the client's loan. These programs, policies

² From a declaration of Lisa Sitkin, Housing and Economic Rights Advocates, 2009.

and procedures change frequently. The process of applying for, obtaining and analyzing a loan modification can take anywhere from two weeks to six months. For some clients, I have spent more than 15 hours communicating with the client, the servicer, the investor and/or other relevant parties. Assisting a client with a loan modification can be as simple as helping them submit their financial information and hardship summary to the servicer and going over the terms of a modification with them, but in many situations, much more work is required. In many cases, I have to spend additional time just confirming that the servicer has all of the required information or is actually reviewing the application or has sent out a promised modification offer. Another factor that can complicate the loan modification application process is that many home loans are actually owned by an entity other than the company that handles the servicing and the modification process. Because I spend a lot of time researching the policies of various financial institutions and cultivating contacts there, I am usually able to investigate whether what the servicer is telling me about constraints on its discretion is correct. If a client receives a modification offer, I spend at least an hour reviewing the terms of the offer, consulting with colleagues and conferring with the client to make sure he or she fully understands the offer.

Every month, we receive at least 8-15 calls from homeowners who have already paid a so-called loan modification consultant thousands of dollars without getting any tangible result. In April 2009, I got a call from a homeowner in Sacramento who paid a company \$4,000 to help him save his house from foreclosure. A month later, the bank foreclosed. The company told this man that they would take care of everything. He sent them every paper he received after the foreclosure, including the eviction papers served on him by the bank. The day before this man called me, the sheriff posted a notice telling the family they had 5 days to leave. The company he paid to help him was still telling this family that it would take care of everything. If the homeowner had been given accurate information earlier in the process, he might have been able to negotiate with the bank for more time or, at least, for some relocation expenses. Instead, I had to be the one to tell him that he was going to have to move immediately to avoid being put out of his home by the sheriff.”

Recommendations:

Clearly, as scams and fraud grow exponentially amidst growing homeowner desperation, greater protections for consumers are needed. We urge the FTC to propose rules that include the following key principals:

- Consumer understanding. Consumers need to be given the tools to effectively evaluate the contracts they are entering into. No consumer can reasonably be expected to understand the nuances of the loan modification process in the best of times. Companies are now feeding on this lack of knowledge in the worst of times, as working families desperately seek to avoid foreclosure. All agreements should require that consumers be notified in visible font that loan modification services are available for FREE from HUD-certified nonprofit housing counseling agencies. Contracts should provide for a homeowners right to rescind for at least

14 days after signing so that consumers can review and discuss the contract with trusted friends, family and advisors.

- Translation and fundamental fairness. In California, a substantial percentage of affected consumers are non English speakers. Loan modification scam artists prey upon immigrant populations by making unfair and deceptive representations to homeowners in their native language and then having them sign an utterly different contract in English, a language that many do not fully understand. Loan modification companies can no longer be allowed to profit on the practice of misleading services to non English speaking homeowners but providing English-only contracts. The FTC should require that companies that solicit and conduct business in a language other than English provide a contract in the language in which business was conducted. State and local legislative proposals on this issue in California provide for such a translation requirement, though these proposals have yet to be enacted and may not become law.
- No advance fees. Loan modification companies in California nearly always charge excessive and unnecessary advance fees of thousands of dollars. The collection of an up front fee provides no incentive for the company to do the hard work of helping a family avoid foreclosure, and is merely an invitation for fraud. Banning advance fees is a crucial component to any effort to reduce loan unfair and deceptive practices in the loan modification industry and will likely push many scam artists out of our communities. The FTC should ban the collection of advance fees outright, and care should be taken to insure that this prohibition is not avoided (for example, by disguising advance fees as “refundable” payments to a “client trust account,” a deceit that is currently used by some loan modification companies in California).

Payment for results. In addition to banning advance fees the FTC should require that a mortgage broker is only paid for actually arranging an affordable and sustainable loan modification. Mortgage brokers do not get paid for trying to arrange a loan, or for placing a few phone calls. They get paid for actually arranging a loan. So, too, loan mod consultants should only receive compensation for actually helping the consumer obtain an affordable loan modification. Anything short of that does not benefit the consumer, and a family struggling to avoid foreclosure should not be obligated to pay for such inadequate and ineffective assistance.

- Reasonable fees. Fees for loan modification services should be commensurate with the benefit to the homeowner. Loan modification and foreclosure rescue scammers make big promises and charge thousands of dollars but often deliver little. Homeowners go to them for one reason—to save their homes from foreclosure. Any fee charged should bear a reasonable relationship to the benefit actually provided to the homeowner.

- Redress for harm. Laws and regulations that prohibit practices are helpful, but compliance always hinges on effective enforcement, which must include a mechanism for making victimized consumers whole. This is the only way to achieve the twin goals of changing abusive industry behavior and helping consumers. AB764 (Nava) and a proposed San Francisco Ordinance both seek to tie the ability to receive compensation to the client actually obtaining a loan modification. AB764 (Nave) provides for criminal penalties for those who violate its provisions, and the San Francisco ordinance provides for both criminal and civil penalties, including a private right of action. Whatever form the rules ultimately take, we look forward to continuing aggressive enforcement actions by the FTC, state Attorneys General, and the private bar to effectively vindicate consumer protections.
- Broad coverage. Currently, California state law on this issue suffers from being diffuse and fragmented. Different code provisions provide for different obligations for different licensees and entities. Prohibitions on loan modification scams under California Civil Code 2945, for example, only apply if a Notice of Default has been recorded against the loan although these companies now solicit struggling homeowners much earlier in the foreclosure process. At all times, all companies should be subject to a similar responsibility to refrain from engaging in abusive practices that send unsuspecting homeowners further into foreclosure.
- Quality of care and professionalism. Companies providing loan modification and foreclosure prevention services should be required to undergo education and certification to ensure competence. Nonprofit housing counselors go through a comprehensive set of trainings and certification through nationally recognized entities such as the Department of Housing and Urban Development and Neighborworks. For-profit companies should be subject to similarly stringent training and certification requirements. If for-profit providers can reasonably be deemed to be taking mortgage applications, they should be subject to the licensing, registering and other requirements of the federal SAFE Act.
- Loan mod servicers v. legal work. Attorneys can be uniquely positioned to help homeowners avoid foreclosure. At the same time, attorneys have proven to be a large part of the loan mod scam problem. The California State Bar Association reportedly is receiving 700 complaints per month related to attorney involvement in providing problematic loan modification services. Especially egregious is when attorneys partner with non attorneys to take advantage of legislative exemptions for attorneys. Attorneys that operate as loan modification specialists should be obligated by the same principles as outlined above, while having greater flexibility to charge in a customary manner for related legal services provided.
- Set baseline protections, no preemption. California and a growing number of California cities are seeking to address this problem in a manner that meets local needs. Los Angeles has passed an ordinance, and San Francisco and Long Beach are considering doing so. In keeping with the states' historical role as laboratories

for regulatory reform, the FTC should propose rules that set a baseline of protections that allow state and local government to craft stronger and more appropriate protections, as needed.

The consequences of these loan modification scams are devastating. Homeowners who are already in extreme financial distress are bilked out of their remaining savings in exchange for false promises. People who cannot afford to keep their homes are being bilked out of money they need to relocate. People who do have a chance of keeping the home are being steered away from legitimate, free homeowner counseling services or are failing to take any action before it is too late because they have been assured everything is being taken care of for them already. All too often, it is not.

Thank you for your consideration of our comments on this important issue. If you should have any questions or require additional information, please feel free to contact Kevin Stein at California Reinvestment Coalition (415-864-3980), or Lisa Sitkin at Housing and Economic Rights Advocates (510-271-8443)

Very Truly Yours,

California Reinvestment Coalition
Housing and Economic Rights Advocates
Affordable Housing Services
Asian, Inc.
Community Legal Services in East Palo Alto
Council on Aging Silicon Valley
East Los Angeles Community Corporation
Fair Housing Council of the San Fernando Valley
Korean Churches for Community Development
Lao Family Community Development, Inc.
Legal Aid Foundation of Los Angeles
Mission Economic Development Agency
Neighborhood Housing Services of Orange County
No Homeowner Left Behind Foundation
Project Sentinel
Sacramento Mutual Housing Association
USF School of Law Predatory Lending Clinic
Visionary Home Builders of California, Inc.
Yolo Mutual Housing Association

Cc: National Consumer Law Center